AUG 15 2003

No. 02-473

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LASHAWN LOWELL BANKS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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As petitioner demonstrated in its opening brief, the Ninth Circuit has adopted an unprecedented, complex, four-part matrix for determining how long officers must wait, after knocking and announcing their presence and receiving no response, before they may enter a residence to execute a valid search warrant. Under the Ninth Circuit's approach, the primary factor is whether the officers must damage some property to effectuate the entry. That approach is inconsistent with this Court's recognition that the Fourth Amendment does not "mandate a rigid rule of announcement," *Wilson* v. *Arkansas*, 514 U.S. 927, 934 (1995), and with this Court's holding that the reasonableness of a no-knock forced entry "depends in no way on whether police must destroy property in order to enter," *United States* v. *Ramirez*, 523 U.S. 65, 71 (1998). Respondent's attempts to defend the Ninth Circuit's ruling in this case

—a ruling the Ninth Circuit has since candidly acknowledged is inconsistent with its own prior decisions and the decisions of many other courts of appeals, see *United States* v. *Chavez-Miranda*, 306 F.3d 973, 981-982 n.7 (9th Cir. 2002), cert. denied, 123 S. Ct. 1317 (2003)—are unavailing.

I. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THIS COURT'S PRECEDENTS

1. As explained in petitioner's opening brief (U.S. Br. 10-22), the Ninth Circuit's rigid and confusing categorical scheme disregards the myriad factual circumstances and dangers confronting officers executing warrants, and in a variety of circumstances would reduce the knock-and-announce requirement to a "senseless ceremony." *Wilson*, 514 U.S. at 936. It also improperly elevates certain factors, such as the destruction of property, which have little or no bearing on the reasonableness of the officers' entry, while ignoring or minimizing other, highly relevant factors, such as the real risk that a suspect would try to destroy evidence (by, for example, flushing the drugs down the toilet). See U.S. Br. 12-16. The Ninth Circuit's approach is therefore antithetical to the flexibility inherent in the Fourth Amendment's general reasonableness standard. See *Wilson*, 514 U.S. at 934; *Ramirez*, 523 U.S. at 71; see also *Ker* v. *California*, 374 U.S. 23, 33 (1963) (holding that "[e]ach case is to be decided on its own facts and circumstances" and that the "standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application").

Respondent attempts to characterize the Ninth Circuit's categorical scheme as a simple application of the "totality of the circumstances" standard that has long been applicable to challenges to the execution of a

search warrant. Resp. Br. 12, 23. According to respondent, the court of appeals' four-part matrix "was merely an analytical distillation of cases" interpreting 18 U.S.C. 3109 and does not require a different period of delay for each category it defines. Resp. Br. 10-11.

Respondent's reading of the opinion below is mistaken. The Ninth Circuit plainly envisioned each of its categories as requiring a different period of delay, with the two determinative factors being whether property must be damaged to effectuate the entry and whether there are exigent circumstances. By its terms, for example, the Ninth Circuit's categorical scheme would require that, absent exigent circumstances, officers must allow for "a lapse of a significant amount of time" before making a *non-forcible* entry. Where, however, that same entry would require *force* that may result in some property damage, the officers must allow "an even more substantial amount of time" after knocking and announcing. Pet. App. 5a-6a. Indeed, at one point, respondent himself appears to acknowledge that the Ninth Circuit's categorical scheme requires additional delays merely because property may be destroyed in a forcible entry. Resp. Br. 25 ("[T]he Ninth Circuit created 'Guidelines' *which require a more meaningful interval of time* between the knock and announce and the forcible entry.") (emphasis added).

Respondent's attempt to characterize the Ninth Circuit's so-called "Guidelines" as dicta is also mistaken. See Resp. Br. 13 ("The Guidelines in *Banks* do not affect the outcome of the case, and the over-arching question which is: whether the officer had paused sufficiently under a reasonableness standard of the Fourth Amendment before making a forcible entry."). The Ninth Circuit expressly applied its "Guidelines" in this case, holding that the entry into respondent's apart-

ment fell into the fourth category of its matrix (forcible entry in the absence of exigent circumstances) and therefore required "an even more substantial amount of time" after knocking and announcing before the officers could lawfully enter the apartment. Pet. App. 6a. Accordingly, the Ninth Circuit adopted an erroneous legal standard and then applied it to the facts of this case. Its holding that the officers violated the Fourth Amendment because they did not wait the "even more substantial amount of time" required under the court's inappropriate standard cannot be dismissed as mere dicta.

2. In addition, as explained in petitioner's opening brief (U.S. Br. 16-22), the Ninth Circuit's reliance on property destruction is fundamentally at odds with this Court's holding in *Ramirez* that the reasonableness of a no-knock entry "depends in no way on whether police must destroy property in order to enter." 523 U.S. at 71. It is no answer to argue, as respondent does (Resp. Br. 12), that *Ramirez* involved a no-knock entry and therefore has no bearing on whether property damage is relevant to determining the reasonableness of an entry where the officers have knocked and announced their presence. *Ramirez* reflects a general principle that the need to damage property to effectuate an entry to execute a search warrant is not part of the analysis of whether the entry itself was reasonable and whether evidence should be suppressed. Instead, the proper inquiries are whether admittance has been effectively refused and whether other law enforcement needs render prompt entry reasonable. See U.S. Br. 18-19.

The Ninth Circuit's decision below nevertheless engrafts a rigid property-destruction limitation onto the knock-and-announce requirement of the Fourth Amendment and 18 U.S.C. 3109, and it does so without

distinguishing, or even citing, *Ramirez*. Indeed, the Ninth Circuit went so far as to hold in category two of its matrix that, even where exigent circumstances exist, the need to damage property to effectuate an entry "necessitat[es] *more specific inferences of exigency*," Pet. App. 5a-6a (emphasis added)—the very requirement this Court rejected in *Ramirez*. See 523 U.S. at 69-70 (quoting *United States* v. *Ramirez*, 91 F.3d 1297, 1301 (9th Cir. 1996)).

Unable to re-characterize the Ninth Circuit's disregard for this Court's holding in *Ramirez*, respondent embraces it, conceding that "[t]he 'four categories' pointed out by the *Banks* court is an effort by the Ninth Circuit to classify the various kinds of entries by police *and require a higher standard of exigencies where destruction of property occurs*, and there is a claim of a knock and announce violation." Resp. Br. 13 (emphasis added). Respondent nevertheless attempts to excuse the panel majority's flouting of *Ramirez* as "the Ninth Circuit Court's effort to give a higher meaning to the Fourth Amendment, and the knock and announce rule which it incorporates." *Ibid.* That description of the court of appeals' goal, however apt, cannot justify its disregard for this Court's precedents.

As petitioner explained in its opening brief (U.S. Br. 20-21), by the time officers have determined that a forcible entry is necessary, they have already balanced the factors that make it reasonable to delay a given period of time before entering, and the need to damage property to effectuate the entry adds nothing to that balancing process. The Ninth Circuit's rigid requirement that officers must wait "an even more substantial amount of time" whenever property may be damaged during the entry would have the perverse effect of encouraging criminals to barricade their doors or take

other actions to increase the amount of property that must be destroyed to effectuate an entry, thereby maximizing the time available to them to escape, dispose of evidence, or otherwise resist the lawful search. Such a result is plainly at odds with *Ramirez* and this Court's other decisions mandating flexibility and common sense in the application of the Fourth Amendment's knock-and-announce requirement.[1]

II. THE ACTIONS OF THE OFFICERS IN THIS CASE WERE PLAINLY REASONABLE

Under the correct legal standard, the officers' actions in forcibly entering respondent's apartment after knocking and announcing their presence and waiting 15-20 seconds without hearing a response was reasonable. Respondent himself concedes that the officers went to his small apartment at 2 p.m. on a weekday to execute a valid search warrant for drugs, evidence which is readily disposable; that the officers "knocked loudly and announced 'Police, search warrant' in a loud authoritative tone"; that the officers did not receive any response; and that they waited at least 15-20 seconds after knocking and announcing before forcibly entering the apartment. Resp. Br. 3-5; Br. in Opp. 3. Respon-

[1] Respondent makes no attempt to confront the dangerous consequences that could flow from the Ninth Circuit's property-destruction standard. Instead, he appears to favor a standard that would have even more dangerous consequences. According to respondent (Resp. Br. 20), "[a]t common-law, law enforcement officers were required to pause until a refusal occurred." Under this so-called "common-law knock and announce rule," *ibid.*, officers are required to continue knocking and announcing until they received an express refusal of admittance. Such a standard is patently inconsistent with this Court's repeated rejection of a "rigid rule of announcement," *e.g.*, *Wilson*, 514 U.S. at 934, and its effect on legitimate law enforcement efforts could be catastrophic.

dent also acknowledges that he was in the shower at the time and did not hear the officers' knock and announcement. Resp. Br. 4; see Pet. App. 14a-16a. Under such circumstances, the officers acted reasonably and the evidence that they obtained during the search of the premises should not have been suppressed.

As petitioner demonstrated in its opening brief (U.S. Br. 22- 25), entries such as the one in this case have been routinely upheld by other courts of appeals. Respondent's attempts to distinguish these conflicting cases are unpersuasive. Frequently, for example, respondent relies on facts, such as the number of occupants and whether any occupant was in the shower or was otherwise "indisposed," that were unknown to the officers at the time they forcibly entered the residence. See Resp. Br. 27-34. That error, in fact, is repeated throughout respondent's brief. See, *e.g.*, *id.* at 26 ("If Mr. Banks is the sole occupant of an apartment and is actually in the shower when the knock and announcement comes, it is not reasonable, under the Fourth Amendment, to expect he would answer the door stark naked and dripping suds, in 15 to 20 seconds or less."). To the extent that respondent's point is that the mere possibility that an occupant might be in the shower or otherwise indisposed means that officers must routinely wait the period of time necessary for the occupant to, for example, stop the shower, dry off, put on a robe, and answer the door, that argument ignores the fact that such an interval would also allow for the complete destruction of evidence or successful escape. Officers executing a warrant routinely are required to make quick judgments based on reasonable probabilities and without knowing what is going on inside a residence. That is one reason why, as this Court explained in *Dalia* v. *United States*, 441 U.S. 238, 257 (1979), "it is

generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant."

In any event, there is no doubt that the Ninth Circuit's decision in this case is inconsistent with the decisions of many other courts of appeals. The court below itself has acknowledged that its reasoning in this case is inconsistent with its own precedents and those of several other courts of appeals. *Chavez-Miranda*, 306 F.3d at 981-982 n.7 ("*Banks* appears to be a departure from our prior decisions. As noted by the trial court, we have found a 10 to 20 second wait to be reasonable in similar circumstances, albeit when the police heard sounds after the knock and announcement. * * * Several other circuits have upheld similar waits even without noise being heard."). Specifically, in *Chavez-Miranda*, *ibid.*, the Ninth Circuit noted that its decision in this case conflicted, *inter alia*, with the First Circuit's decision in *United States* v. *Garcia*, 983 F.2d 1160, 1168 (1993), the Fifth Circuit's decision in *United States* v. *Jones*, 133 F.3d 358, 361-362, cert. denied, 523 U.S. 1144 (1998), the Eighth Circuit's decision in *United States* v. *Lucht*, 18 F.3d 541, 548, 549, cert. denied, 513 U.S. 949 (1994), and the D.C. Circuit's decision in *United States* v. *Spriggs*, 996 F.2d 320, 323, cert. denied, 510 U.S. 938 (1993), all of which were discussed in petitioner's opening brief (U.S. Br. 22-25), and all of which respondent unsuccessfully attempts to distinguish on their facts (see Resp. Br. 27-30). In addition, the Sixth Circuit, in upholding the reasonableness of a forced entry 8-10 seconds after the officers knocked and announced their presence, recently rejected the Ninth Circuit's reasoning in this case as "inconsistent with [Sixth Circuit] precedent[s]." *United States* v. *Pennington*, 328 F.3d 215, 222 n.4 (2003).

Respondent also mistakenly asserts (Resp. Br. 35) that petitioner is seeking to frustrate the totality-of-the-circumstances test by advocating "a rigid rule that 15 to 20 seconds constitutes sufficient time to infer a refusal under the knock-and-announcement statute." To the contrary, petitioner asks this Court to reject the Ninth Circuit's rigid categorical scheme precisely because it lacks the flexibility vital to the proper application of the totality-of-the-circumstances test, fails to take into account the full range of factual circumstances facing law enforcement officers, and places undue reliance on the destruction of property, which has little or no bearing on the reasonableness of the officers' entry. In any event, respondent cannot use the flexibility of the totality-of-the-circumstances analysis to justify the Ninth Circuit's plainly erroneous holding that a delay of 15-20 seconds after knocking and announcing was unreasonable under the circumstances of this case. See U.S. Br. 22-25.

III. SUPPRESSION OF EVIDENCE WOULD BE AN IMPROPER REMEDY

Even if there were a knock-and-announce violation in this case, suppression of evidence would be an unjustified remedy. That is so for two reasons. First, the entry in this case caused no harm to any of the interests protected by the Fourth Amendment. Because respondent was in the shower and did not hear the officers when they knocked and announced, events would have unfolded no differently had the officers delayed longer before entering. The search warrant authorized entry, and respondent would have been in the same position had the officers waited a few more moments before executing the warrant. See Pet. App. 16a (Fisher, J., dissenting). Accordingly, respondent misses the point

when he contends (Resp. Br. 36) that his Fourth Amendment privacy interests were harmed because "[h]e was confronted with armed strangers bursting into his home while he stumbled naked, wet and in fear for his life." He would have been confronted with the exact same scenario even if the officers had delayed longer before forcibly entering his apartment.

Second, suppression would be an improper remedy because the entry was not causally connected to the discovery of the evidence in this case. As reflected in the inevitable-discovery and independent-source exceptions to the exclusionary rule, suppression is generally appropriate only where the constitutional violation is causally connected to the discovery of the challenged evidence. See U.S. Br. 27-28. Here, the evidence was discovered as a result of the warrant-authorized search. Application of the exclusionary rule in such circumstances places the government in a worse position than it would have been in had there been no violation and, therefore, imposes unjustified costs on society. See, *e.g.*, *Nix* v. *Williams*, 467 U.S. 431, 443 (1984) ("[T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred."); *Segura* v. *United States*, 468 U.S. 796, 815 (1984) ("Suppression is not justified unless 'the challenged evidence is in some sense the product of illegal governmental activity.'") (citation omitted); see also *United States* v. *Langford*, 314 F.3d 892, 894 (7th Cir. 2002) ("[I]t is hard to understand how the discovery of evidence inside a house could be anything but 'inevitable' once the police arrive with a warrant.") (citation omitted); *United States* v. *Jones*, 214 F.3d 836,

838 (7th Cir. 2000) ("A warrant authorized the entry, so seizure of evidence was inevitable."); but see *United States* v. *Marts*, 986 F.2d 1216, 1219-1220 (8th Cir. 1993) (rejecting in dicta application of independent-source doctrine to violation of knock-and-announce rule); *United States* v. *Dice*, 200 F.3d 978, 985 (6th Cir. 2000) (rejecting inevitable-discovery exception in knock-and-announce violation case where there was no evidence that a second, independent investigation would have led to discovery of evidence).[2]

Finally, respondent is mistaken in suggesting that the requirement that there be a causal connection between an alleged knock-and-announce violation and the discovery of evidence before the evidence may be suppressed "would remove most, if not all, knock and announce violations from judicial scrutiny." Resp. Br. 37. Law enforcement officers would still have ample incentives to comply with the Fourth Amendment's

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[2] Respondent mistakenly asserts (Resp. Br. 35) that petitioner never raised the remedy issue below. In the suppression hearing before the magistrate judge, petitioner argued that the motion to suppress should be denied because respondent "was in the shower. If they would have waited, you know, another thirty seconds or maybe another ninety seconds or a hundred and twenty seconds, he would have never heard it 'cause he was in the shower. The only thing he hears is the battering ram through the door. So, that point is moot." J.A. 147. In addition, petitioner argued in its petition for rehearing in the court of appeals that "application of the exclusionary rule [was] inappropriate" because "a longer delay would have made no difference to the events that subsequently transpired." Gov't C.A. Pet. for Reh'g 15. In any event, respondent failed to raise any preservation issues in his brief in opposition to certiorari, and under Rule 15.2 of this Court's Rules, he may, therefore be deemed to have waived any such objection. See *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 815-816 (1985); *City of Canton* v. *Harris*, 489 U.S. 378, 385 (1989).

knock-and-announce requirement. To begin with, officers' concern for their own safety is itself significant incentive to follow the knock-and-announce rule. See *United States* v. *Mendoza*, 281 F.3d 712, 717 (8th Cir.) ("Because [the police] announced their presence and stated their purpose, the potential for violence was diminished."), cert. denied, 123 S. Ct. 515 (2002); *United States* v. *Bustamante-Gamez*, 488 F.2d 4, 11 (9th Cir. 1973) ("[I]f announcement is made simultaneously with or shortly before entry it is unlikely that a law-abiding citizen would respond violently or provoke violence on the part of the officers."), cert. denied, 416 U.S. 970 (1974); cf. *Sabbath* v. *United States*, 391 U.S. 585, 589 (1968); *Miller* v. *United States*, 357 U.S. 301, 313 n.12 (1958). In addition, judicial remedies for constitutional violations may be available through claims under 42 U.S.C. 1983 and the *Bivens* doctrine. See *Langford*, 314 F.3d at 894-895. There are also non-judicial remedies that will continue to deter law enforcement officers from violating the knock-and-announce rule, such as the possibility of departmental discipline. See *Nix*, 467 U.S. at 446 ("Significant disincentives to obtaining evidence illegally—including the possibility of departmental discipline and civil liability —also lessen the likelihood that the ultimate or inevitable discovery exception will promote police misconduct.") (citing *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 397 (1971)). Moreover, given the nature of Fourth Amendment inquires, and in particular the application of the totality-of-the-circumstances standard, it is never in the interests of law enforcement for officers to be adjudicated to have violated the Fourth Amendment before they have even crossed the threshold of a residence to execute a search warrant. Lastly, officers would still have incentives to avoid

potential Fourth Amendment challenges by knocking and announcing their presence and asking for consent to search the premises, and suppression would remain a potentially appropriate remedy where the officers fail to comply with the knock-and-announce requirement and the warrant authorizing the search is defective.

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For the foregoing reasons and those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

AUGUST 2003